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No. 43 and 44

In the Supreme Court of the United States

October Term, 1931

STATE OF UTAH AND INDEPENDENT COAL & COKE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

CARBON COUNTY LAND COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 42

STATE OF UTAH AND INDEPENDENT COAL & COKE Company, petitioners

v.

UNITED STATES OF AMERICA

No. 48

CARBON COUNTY LAND COMPANY, A CORPORATION, petitioner

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

Upon motion to dismiss the original bill the District Court rendered no opinion; the opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 9 F. (2d) 517, and the opinion of this Court is reported in 274 U. S. 640. Following the trial on the merits, the District Court rendered no opinion. The opinion of the Circuit Court of Ap-

peals (R. 611–625) is reported in 46 F. (2d) 980. Both petitions involve the same decree of the court below.

JURISDICTION

The decree of the Circuit Court of Appeals was entered January 14, 1931. (R. 626.) The petition for certiorari in No. 42 was filed April 6, 1931, and that in No. 48 was filed April 13, 1931. Writs of certiorari were granted May 18, 1931. (R. 630.) Jurisdiction is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether under the circumstances hereinafter set forth the United States is entitled to a decree quieting its title to certain public lands certified to the State of Utah during the years 1900 to 1904, and to the other relief awarded by the court below.

STATUTES INVOLVED

The statutes which the petitioners assert are involved are printed at pp. 2–7 of the brief for the State of Utah, No. 42.

STATEMENT

This is a suit in equity brought by the United States to quiet its title to certain lands. This Court considered the original bill of complaint in *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640, determined its sufficiency, held that a motion to dismiss it should have been denied, and in doing so passed upon substantially all the contentions now presented. The case is now here again

upon writ of certiorari to review a decision of the Circuit Court of Appeals for the Tenth Circuit reversing a decree of the District Court dismissing the bill as amended after final hearing, and directing the entry of the decree prayed for by the United States. (R. p. 626.)

When the case was here before, this Court summarized the circumstances, since found by the court below, under which title to these lands was acquired from the United States by the State of Utah and equitable title thereto was transferred by the State to the Carbon County Land Company. The summary (pp. 642-644) follows:

> This is a second suit by the United States, and is in aid of the first, for the restoration to the government of some fifty-five hundred acres of public lands located in Utah, title to which was procured by a fraud perpetrated upon the land officers of the United States. The first suit, which resulted in a judgment for the government (affirmed 228 Fed. 431), was predicated upon the following circumstances:
>
> The United States, in 1894, made a grant of public lands to the State of Utah to aid in the establishment of an agricultural college, certain schools and asylums and for other purposes. (Sections 8 and 10, Act of July 16, 1894, c. 138, 28 Stat. 107, 109, 110.) Mineral lands were not included. See *Milner* v. *United States*, 228 Fed. 431, 439; *United States* v. *Sweet*, 245 U. S. 563; *Mullan* v. *United States*, 118 U. S. 271, 276; Sec. 2318

R. S. The grant was not of lands in place. Selections were to be made by the state with the approval of the Secretary of the Interior, from unappropriated public lands, in such manner as the legislature should provide. The legislature (Laws, Utah, 1896, c. 80) later created a board of land commissioners with general supervisory powers over the disposition of the lands and with authority to select particular lands under the grants.

During the period from December 10, 1900, to September 14, 1903, Milner and others, the predecessors in interest of the Carbon County Land Company, one of the petitioners, made several applications to the State Commission to select and obtain in the name of the state the lands now in question, and at the same time entered into agreements with the Commission to purchase the lands from the state. In aid of the applications and agreements, Milner and his associates filed affidavits with the Commission stating that they were acquainted with the character of these lands which they affirmed were nonmineral and did not contain deposits of coal. They also deposed that the applications were not made for the purpose of fraudulently obtaining mineral holdings, but to acquire the land for agricultural use. The applicants were obviously aware that the affidavits or the information contained in them would in due course be submitted to the Land Office of the United States with the State Commission's selections, as they were in fact.

On the faith of these and other documents, the selections were approved by the Secretary of the Interior, and the tracts in question were certified to the state on various dates, the last being in December, 1904. Certification was the mode of passing title from the United States to the state.

In January, 1907, the United States brought the first suit, against Milner and his associates and the Carbon County Land Company, which had been organized by Milner to take over the land, and was controlled by him. The suit was founded on the charge that the certifications were procured by the fraudulent misrepresentations of Milner and the others since they knew at the time of the applications that the lands contained coal deposits. * * * the bill * * * sought the quieting of the government's title. It affirmatively appears that on June 8, 1914, the district court entered a decree declaring that the United States "is the owner" and "entitled to the possession," of the lands in qeustion and that the defendants "have no right, title or interest, or right of possession," and perpetually enjoining them "from setting up or making any claim to or upon said premises." The Court of Appeals, in affirming the decree, held [*Milner* v. *United States*, 228 Fed. 431; appeal dismissed, 248 U. S. 594] that "the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of these lands from the United States."

The State of Utah was fully advised of the filing of the original suit in 1907 by the United States. On January 8, 1907, a copy of the bill of complaint in that suit (R. 175–195) was handed to the Board of Land Commissioners of the State of Utah by a Special Assistant to the Attorney General, who at that time informed the Board that the Attorney General had caused the same to be filed in the Federal court. (R. 263, 265.) He further stated that the legal title to the land was then in the State of Utah and that if the Government were successful in the *Milner* suit the title still would be in the State. He stated that "We do not seek to deprive you of these lands, but we do seek to prevent these valuable claims from being acquired by private parties, and we desire to relieve the State from the frauds perpetrated upon it." He then read to the Board the opinion of this Court in *Williams* v. *United States,* 138 U. S. 514. (R. 263-264.)

Notwithstanding the decree entered in 1914, after notice to it of the pendency of the suit, the State of Utah in January, 1920, entered into a new contract with the Carbon County Land Company (a party to that suit which had been there adjudged to have no right, title or interest or right of possession in the lands involved and had been perpetually enjoined "from setting up or making any claim to or upon said premises" (*Independent Coal Company* v. *United States, supra,* pp. 643–644), whereby the State agreed to sell, and the company to buy, the identical land involved in the first suit for $100 per

acre [1]. Pursuant to this contract the State patented the lands to the Land Company on February 10, 1920. In connection with this transaction the Land Company gave its notes to the State for the entire amount of the purchase price, payable: $100,000 on January 2, 1930 (R. 384), $200,000 on January 2, 1940 (R. 385), $256,428 on January 2, 1950 (R. 386). No interest was to be paid for the first five years. A mortgage on the lands involved, securing payment as aforesaid (R. 586), was executed by the Land Company on January 2, 1920. No part of the principal or interest of said notes has been paid to the State. (R. 42, 43, 57.)

Thereafter, in October, 1920, the Land Company sold 1,120 acres of the lands in controversy to the Independent Coal & Coke Company. The sale to the Coal Company involved some 400 acres of additional land not involved in this suit. The Coal Company purchased the land subject to $112,000 of the mortgage indebtedness of the Land Company to the State, which the Coal Company agreed to pay, and having increased its capital stock, transferred to the Land Company, in payment for the entire 1,520 acres, 500,000 shares of its capital stock having a par value of $1 per share and a market value of approximately 60 cents a share, and received from the Land Company a warranty deed to the en-

[1] The original contract between the State and the Milners provided for a purchase price of $1.50 an acre. For the purpose of this suit full payment of all sums due under the original contract has been admitted by the State. See point I of the argument.

tire tract of land so purchased. (R. 429–430, 436, 575–576.) The State of Utah agreed that on payment of the sum of $112,000 to it, it would release the mortgage executed by the Land Company on the 1,120 acres of the land so purchased by the Coal Company. (R. 409.)

When the Coal Company entered into this transaction with the Land Company it was fully advised of the judgment and decree in the *Milner* suit, knew of the fraud by which the defendants to that action had procured the certification of the land to the State, and that the land was known coal land at the time of such certification. (R. 409–425, 615.) It appears that before the purchase was consummated the Coal Company took the advice of counsel as to the validity of the title to the lands in question (R. 409–425) and made the purchase only after being advised by counsel that the title had within it certain elements making it appear to be voidable unless "the Statute of Limitations applies and has run" (R. 420).

Since the State of Utah did not conform its action to the decree in the first suit, and the companies acted in flagrant violation of that decree, the United States brought the present action, which "is in aid of the first" (*Independent Coal Company* v. *United States, supra,* p. 642), against the Carbon County Land Company and the Independent Coal & Coke Company and others whose interests are not now material. The original bill in

this suit was filed in May, 1924, and the relief asked was that a trust be impressed in favor of the plaintiff; that the defendants be ordered to convey whatever title they had subject only to any mortgages which the State may have retained in conveying the legal title; and that the defendants be enjoined from mining coal. (R. 175–195.) (See *Independent Coal Company* v. *United States, supra,* p. 645.) Upon motion of the defendants the District Court dismissed the original bill on the ground that the suit was barred by Section 8 of the Act of March 3, 1891 c. 561, 26 Stat. 1095, 1099, which provides that suits by the United States to vacate and annul any "patent" shall be brought within six years after the date of the issuance thereof. Upon appeal the judgment of dismissal was reversed, the Circuit Court of Appeals for the Eighth Circuit holding that the Act of March 3, 1891, did not bar the action and that the allegations of the bill if proven entitled the United States to the relief sought. *United States* v. *Carbon County Land Co.,* 9 F. (2d) 517 (C. C. A. 8th). A petition for certiorari was filed on behalf of the Carbon County Land Company and the Independent Coal & Coke Company February 17, 1926. On March 8, 1926, the State of Utah filed a suggestion as *amicus curiae* in support of the petition, alleging its interest in the questions presented by the petition. A writ of certiorari was granted by this Court March 22, 1926. 270 U. S. 639. The Attorney General of

the State of Utah filed a brief as *amicus curiae* in behalf of the State.[2] This Court affirmed the decision of the Circuit Court of Appeals. *Independent Coal Company* v. *United States, supra.* In accordance with the suggestion contained in the opinion of this Court the United States filed an amended bill of complaint (R. 1), which clarified the allegations with respect to the relief sought in the first suit and which otherwise differs from the original bill only in certain minor respects. The amended bill in substance states the same cause of action and asks the same relief as did the original bill.

Answers were filed on behalf of the Land Company and the Coal Company alleging that the State of Utah was not bound by the 1914 decree; that at the time of the original certifications to the State the lands in question were not known to be mineral lands; that prior to the contract entered into in 1920 the State of Utah had acquired a new and un-

[2] In this brief it was contended on behalf of the State (1) that the original certifications by the United States in 1901 and 1904 conveyed title from the United States to the State of Utah; (2) that the decree in the first suit did not in any way affect the title of the State of Utah to the lands in question; (3) that the State of Utah had a valid title to the lands in January and February, 1920, that it had a right to convey the same to whomsoever it saw fit, and that the mortgage held by the State was in all respects valid; (4) that at the time of the commencement of this action the United States had no interest in the land in question, and (5) that this action was barred by Section 8 of the Act of March 3, 1891.

assailable title to the lands by reason of the Act of March 3, 1891, and that the claims of the answering defendants rested upon this new title; that the United States was estopped from questioning the title of the State's grantees by the statements made by a Special Assistant to the Attorney General to the Board of Land Commissioners of the State relating to the purpose of the first suit; that the United States was barred by laches; and that the United States could not equitably reclaim the land from the State without transferring other lands to the State in lieu of lands involved in this suit and repaying the defendants for improvements placed on the land.

The Government by replication pleaded the known coal character of the land at the time of the certification, the adjudication in the *Milner* case of this fact and of the fraud, against the Land Company, and notice of the fraud and of its adjudication to the Coal Company at the time of its purchase from the Land Company. (R. 62, 63, 66, 67.)

The State of Utah, over the objection of the Government, intervened, alleging in its complaint in intervention (R. 36) that if the defendants were deprived of the property this would result in a claim by the defendants against the State (R. 36); that the State had title, as pleaded in the answers of the other defendants; that the Government was estopped (R. 39-40); that the Government was barred by laches and limitations (R. 43); that the plain-

tiff by this suit had cast a cloud upon the title of the State (R. 44); that the adjudication in the first suit was not binding upon the State, and after certain other allegations the State sought a decree quieting its title against the United States and adjudging the mortgage from the Land Company to be a valid lien. (R. 44.)

The United States filed an answer to the complaint in intervention, which contained denials and alleged as a counterclaim the entire history of the earlier litigation, the known coal character of the land at the time of the certification to the State, the fraud of the Milners and the Carbon County Land Company established in the former suit, and asked a decree declaring a constructive trust, the quieting of its title against the State, the cancellation of the mortgage held by the State or, if such relief was not granted, then, in the alternative, a decree cancelling the certifications of the land to the State and the patent from the State to the Land Company. (R. 70–93.) The State filed a replication denying the known mineral character of the land at the time of certification and setting up the statute of limitations limiting the time for the institution of suits to cancel patents. (R. 95, 96.)

Upon the trial testimony was introduced by both sides as to whether the lands were known mineral lands at the time of the original certification. (R. 106–174, 441–459.)

The District Court held that the State was the owner of the lands and decreed that its title be

quieted as against the United States. (R. 97–98.) The court further decreed that the patent issued in 1920 by the State to the Land Company was void. (R. 98.) On appeal the judgment of the District Court was reversed. (R. 610–625.)

The court below held that the State was bound by the adjudication of facts in the original action and, further, that if not so bound the evidence in this action established that the lands in question were mineral lands and that the original certifications had been secured by fraud, although the State was an innocent instrumentality in securing the certifications. The court found that no affirmative defense to the amended bill had been established; that the Land Company was not a *bona fide* purchaser; that the Coal Company knew all the facts as to the original action by the United States when it purchased part of the land from the Land Company; and that since the State in 1920 had parted with title and claimed only under a mortgage from the Land Company, it was bound as privy of that company. On the assumption that the State was not bound as privy, the court held that the State was bound in equity by the decree of 1914. The court further held that the State was in no sense an innocent purchaser for value, and that when it issued the patent in 1920 it knew that the legal title which it had was acquired through misrepresentations made by the Milners and knew that this had been adjudicated in the first suit. The court further held that the action was not one

to cancel the original certifications but was a suit in aid of the 1914 decree and hence was not barred by the Act of March 3, 1891.

The court directed that a decree be entered impressing a trust upon the title held by the Land Company, the Coal Company, and the State in favor of the United States, ordering the defendant companies to convey to the United States, and cancelling the mortgage lien and any tax or other liens held by the State, and quieting the title of the United States against the defendant companies and the State. (R. 625.)

The District Court was instructed to enter a decree—

> * * * including therein that the titles held by the Carbon County Land Company and the Independent Coal and Coke Company and the State of Utah are impressed with a trust in favor of the United States of America; that the Carbon County Land Company and the Independent Coal and Coke Company convey to the United States of America the titles which stood in their names when this suit was brought, failing which the decree shall operate as such conveyance; that said decree shall operate as a cancellation of the lien of the mortgage held by the State of Utah and of any tax deeds or liens thereon; that the title of the United States of America be quieted; that the Carbon County Land Company, the Independent Coal and Coke Company and the State of Utah, and anyone claiming under them,

be enjoined from asserting any claim to the title or possession of the premises * * *. (R. 626.)

When petitions for certiorari were filed in No. 42 on behalf of the Independent Coal & Coke Company and the State of Utah, and in No. 48 on behalf of the Carbon County Land Company, the United States did not oppose the petition on behalf of the State, but its failure to oppose was placed upon the ground that since the case involved a controversy between a State and the United States there was necessarily presented a question worthy of review in this Court irrespective of the merits, and the Government did not oppose the petitions on behalf of the companies so that the final disposition of the case might be consistent.

SUMMARY OF ARGUMENT

The decision of this Court in *Independent Coal Company* v. *United States,* 274 U. S. 640, establishes that the decree entered in 1914 in the former suit was conclusive that the Land Company was a party to the fraud used in obtaining a certification of public lands to the State of Utah, and that neither the Land Company nor any one claiming under it with notice could by any device, however ingenious, acquire title to the lands from the State free from the taint of the fraud. The previous decision of this Court also establishes that the equitable rights of the United States under the 1914 decree could be asserted against anyone who

claimed an interest in the lands, except an innocent purchaser for value.

The court below found that the Coal Company was not an innocent purchaser for value and accordingly the decree entered by the court below was authorized by the former decision of this Court. The State of Utah was not an innocent purchaser for value. Its interest in land under the mortgage executed by the Land Company in 1920 was obtained with knowledge of the suit which resulted in the decree of 1914 and of the nature and effect of that decree. It is unnecessary to determine whether the State was bound by the 1914 decree in the same sense that the Land Company was bound, since in any event the interest of the State under the mortgage was invalid as against the equities of the United States. Furthermore, the State was bound in equity by the 1914 decree under the rule announced in *Williams* v. *United States*, 138 U. S. 514, and in view of the peculiar circumstances of this case.

Under the opinion of this Court in the *Independent Coal & Coke Company* case, *supra*, the law of this case is that this is not a suit to cancel a certification and accordingly it is unnecessary to decide whether Section 8 of the Act of March 3, 1891, as amended, limits the time within which a suit may be brought to cancel a certification. Cancellation of the certification to the State was not asked in the amended bill of complaint, nor was such cancella-

tion necessary to enable the United States to obtain the fruits of the 1914 decree to which it was entitled.

It was established and found by the court below in this suit, to which the State was a party, that the lands certified to the State were known mineral lands when certified.

Possible hardship to the State or the Coal Company is not a reason for denying relief to the United States. The petitioners intentionally disregarded the 1914 decree and acted, with knowledge, in derogation of the rights of the United States.

ARGUMENT

I

THE RIGHT OF THE UNITED STATES TO RELIEF IN THIS SUIT IN AID OF THE 1914 DECREE HAS BEEN ESTABLISHED

The previous decision of this Court in affirming the decree in this case, which reversed the decree dismissing the original bill of complaint (*Independent Coal Company* v. *United States*, 274 U. S. 640), disposes of most, if not all, of the arguments now advanced on behalf of petitioners.

As to the petitioner Carbon County Land Company, that decision establishes that the 1914 decree was conclusive that the Land Company was a party to the fraudulent scheme or conspiracy to acquire title to the public lands by using the State and its officials as agencies to secure the transfer; that the United States was the true and full owner of the land to the exclusion of the Land Company; and that neither the Land Company nor any one claim-

ing under it with notice could by any legal device, however ingenious, acquire title from the State free from the taint of its fraud. That decision further establishes that this is a suit in aid of the former decree and is an appropriate method of securing the benefit of the first decree. This Court also held that the decree transferred from the Land Company to the United States all rights which the Land Company acquired under the original contracts with the State, or conclusively established that the United States was equitably entitled to have them transferred. Accordingly, we submit that by the previous decision of this Court in this case it is established that the United States is entitled to the relief awarded by the court below against the Land Company.

As to the petitioner Independent Coal & Coke Company, the decision of this Court in *Independent Coal Company* v. *United States, supra,* establishes that if it was a subsequent purchaser from the Land Company and had notice of the fraud perpetrated by the Land Company, it could not, as against the United States, acquire title free from the taint of that fraud. The Court held that if it was such a purchaser with notice, the United States was entitled to the relief sought against it.

It is entirely clear that the interest of the Coal Company in the portion of the lands involved, claimed by it, was acquired from the Land Company after the State of Utah issued its patent to the Land Company. The patent from the State

to the Land Company, which included the lands claimed by the Coal Company, was issued on February 10, 1920. (R. 382.) The sale by the Land Company to the Coal Company took place in October, 1920. (R. 436.) The record shows (R. 409–425), and the court below found (R. 619), that at the time of the purchase by the Coal Company it knew all of the facts about the history of the land and had knowledge of the decree in the former suit establishing the fraud by which the original certifications were procured. Before taking title it sought the advice of counsel as to the condition of the title. (R. 409–425.) There can be no doubt, therefore, that the Coal Company purchased with notice of the fraud established by the 1914 decree and elected to take the risk involved in the acquisition of a title with known infirmities. Accordingly, under the decision of this Court in *Independent Coal Company* v. *United States, supra,* the United States was entitled to a decree imposing a constructive trust upon the portion of the lands acquired by the Coal Company, and the court below properly awarded that relief against the Coal Company.

In an effort to escape the effect of the previous decision of this Court in the *Independent Coal Company* case, it is now contended by the Coal Company that it had a direct relation to the State with respect to the lands in controversy, and asserting that the title of the State is unassailable, it claims a right to clothe itself with the State's title.

It is clear, however, that the purchase of the lands in question was made by the Coal Company from the Land Company, and that its title thereto depends solely upon its transaction with the Land Company in October, 1920. (R. 429–430, 436, 575–576.) The only relationship between the Coal Company and the State appears from a certified copy of the minutes of the State Board of Land Commissioners at a meeting held on December 14, 1920 (R. 409), which shows that the secretary of the Board was authorized to advise the Coal Company that when the portion of the mortgage on the lands patented by the State to the Land Company, assumed by the Coal Company, amounting to $112,000, was paid, a release would be executed to free the lands acquired by the Coal Company from the mortgage held by the State. This did not constitute the Coal Company a purchaser from the State and was a mere recognition of the contract between the Land Company and the Coal Company and an undertaking to release a portion of the mortgage upon the lands patented to the Land Company when the portion of the contract between the Coal Company and the Land Company requiring the former to pay $112,000 was performed.

It is contended on behalf of all the petitioners that the State was not bound by the 1914 decree and that this suit is barred by the statute of limitations. We shall discuss the statute of limitations later in the argument. We submit that for the purpose of

this case it is unnecessary to determine whether or not the State was bound by the 1914 decree.

The land in question was originally sold by the State to Milner and his associates between 1901 and 1904 for $1.50 an acre. (R. 90–91.) These contracts were assigned to the Land Company, a corporation in which the Milners owned approximately all the stock. (R. 91.) The validity of these contracts is not questioned by the State. By these contracts and their assignment to it the Land Company became the equitable owner of the property, the State retaining legal title merely as security for the payment of the purchase price. *Independent Coal Company* v. *United States, supra,* page 644. The purchase price under the original contracts was payable in ten annual installments. While no evidence was offered to show whether or not these payments were all actually made, the portion of the answer of the United States to the State's complaint in intervention which was pleaded as a counterclaim alleged that the "payments, as required under said contracts, were made as therein provided." (R. 91.) The reply of the State to this counterclaim contained no denial of this allegation. (R. 95–96.) It is asserted in the brief on behalf of the State that it had a substantial property interest in the lands at the time of the entry of the 1914 decree and that it still has such interest. (Br. 32.) It is not stated expressly that the State did not receive payment in full under the original contracts. The State contends, however, that

under Equity Rule 31 the allegation of payment contained in the answer of the United States to the complaint in intervention is deemed denied. (Br. 33.) The allegation in the answer referred to, however, was not a mere allegation of new matter, which would, under the rule, be deemed denied, but it was a part of the Government's counterclaim. Accordingly, under Equity Rule 31 it would seem clear that the allegation is admitted by failure to deny it, and therefore the State is not in a position to claim, as it now appears to do, that it was not fully paid under the original contracts, and for the purpose of this case full payment must be deemed to be admitted.[3] See *Clifton* v. *Tomb*, 21 F. (2d) 893 (C. C. A. 4th).

Upon payment in full the Land Company became the owner in equity of the entire title to the lands. *Jennisons* v. *Leonard*, 21 Wall. 302, 309. Accordingly, at the time of the entry of the 1914 decree whatever interest the State had under the original certifications belonged in equity to the Land Company. The 1914 decree had the effect either of transferring the equitable title which the Land Company then had to the Government or it was a determination that the Government was equitably entitled to a transfer of such rights. If the former, the Government was entitled to assert the

[3] In *Milner* v. *United States*, 228 Fed. 431, 436 (C. C. A. 8th), *supra*, it is stated that "the payments as required by the contracts of purchase have been made as therein provided."

rights against the Land Company (*Independent Coal Company* v. *United States, supra,* p. 648) and anyone claiming under it who was not a *bona fide* purchaser. It would seem to follow that if this was the effect of the decree the United States had the same right which the Land Company would have had as equitable owner to a transfer of legal title from the State, which no longer had any right to that title as security. If the 1914 decree did not have the effect of transferring the rights of the Land Company to the United States and only constituted an adjudication that the United States was equitably entitled to those rights, this Court has held that the Land Company could not acquire any title to the lands even through a new and independent contract without a surrender of the rights under the earlier contracts, and it could not make a surrender of such rights effective against the United States without its assent, unless the State stood in the position of a purchaser for value without notice. (*Independent Coal Company* v. *United States, supra,* p. 648.)

It is not contended by the State that it was a purchaser for value without notice of any interest in the land after the entry of the 1914 decree. The State had notice of the commencement of the first action in 1907, and must be deemed to have had notice of all the proceedings in that action. (R. 263–265.) It can not be said to be a purchaser for value of any rights it now claims to hold because it parted with the entire equitable title when it con-

tracted to sell the lands to the Milners and thereafter received payment in full of the agreed purchase price. (See *Independent Coal Company* v. *United States supra,* p. 644.) So far as appears it never cancelled the contracts with the Milners and it never did acquire any claim of title excepting under the purchase money mortgage executed and delivered by the Land Company in 1920. But the delivery of the patent to the Land Company in 1920 and the execution of the purchase money mortgage to secure payment of the newly arranged purchase price for the lands covered by the patent did not make the State a purchaser for value. If the State then became a purchaser under the mortgage, it was in privity with the Land Company, which could convey no interest in the land unaffected by the 1914 decree of which the State had notice. Nor was any value given by the State at that time. The delivery of a patent in an attempt to vest a title which it had no right to convey to the Land Company, and which the Land Company had no right to receive from it, could not constitute value which would be recognized in equity.

By the patent to the Land Company in 1920 the State divested itself of legal title to the land, retaining only its interest under the mortgage executed by the Land Company. That purported to give it a lien, which could have no validity against the United States, to secure the payment of the purchase price of land which it could neither convey to

the Land Company nor of which the Land Company could receive title except under a constructive trust for the United States. If the 1914 decree be regarded as transferring to the United States all equitable rights of ownership in the land, the transfer of legal title by the State to the Land Company constituted the United States the owner in equity of the entire title with a right to such equitable remedies as might be necessary to remove the cloud created by the mortgage, and the United States had the same right if the effect of the 1914 decree was only to determine that the United States was equitably entitled to the then existing equitable ownership of the Land Company. On any theory the only thing remaining in the State after the patent executed in 1920 was the lien created by the mortgage which was invalid as against the United States.

We submit that the court below properly decreed that the title was impressed with a trust in favor of the United States and that the mortgage held by the State should be cancelled and the title of the United States quieted as against the companies and the State so that the decree of 1914, openly violated by all the petitioners, might be given effect.

In substance the situation of the State is that although it had knowledge of the 1914 decree which adjudged that the lands upon which it now claims to have a lien, created after the decree, were fraudulently obtained from the United States, it nevertheless asserts a right to retain such lien. But

that lien is upon lands to which it did not at the time the lien was created have equitable title and if it is allowed to keep that lien it is, in the most direct way, profiting by the fraud practiced upon the United States. One who takes with notice can not profit by the fraud of another or escape the hot pursuit of equity, which abhors fraud. *McIntire* v. *Pryor,* 173 U. S. 38, 52. See Pomeroy's Equity Jurisprudence, 4th ed., sec. 918. The lien was granted by the Land Company, which had been adjudicated to have and to be able to acquire no interest in the land as against the equities of the United States. Having none, it could, in equity, grant none and therefore whether the State is or is not bound by the 1914 decree it can not obtain the benefits of the fraud from one who has been forbidden to profit for itself directly or to do so indirectly by assuming to deal with any interest in the land.

In the brief filed on behalf of the State of Utah as *amicus curiae* in *Independent Coal Company* v. *United States, supra,* the contention was made that the State was not bound by the 1914 decree. As the opinion of this Court does not deal with that contention except indirectly, we suggest that this indicates that, as we contend, the determination of whether the State was bound by the decree is unnecessary to a disposition of this case, because, whether it was or not, the United States was entitled to the equitable relief awarded by the court below.

While it seems to us unnecessary to consider whether the 1914 decree was conclusive against the

State as to the title of the United States or as to the fraud involved in procuring the original certifications, we submit that the State was bound by that decree. Although the State was not a party to the suit, it was given immediate notice of the commencement thereof and a copy of the bill of complaint was served upon the State Board of Land Commissioners. At the same time the opinion of this Court in *Williams* v. *United States,* 138 U. S. 514, was read to the Board. In that case this Court announced the alternatives with which a State is faced when litigation is commenced by the United States under similar circumstances. The Court there said (p. 516):

> The State of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the general government. If its agency had been used by the wrong-doer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away to the alleged wrong-doer, it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which

a title to real estate has been wrongfully obtained from the general government.

The brief for the State contains (Br. p. 22) a statement of the reasons for its failure to conform to the decree in the first suit. Since the United States is equitably entitled to the relief granted by the court below, in any view, the reasons for the failure of the State to conform to the decree in the first suit in accordance with the suggestion of this Court under similar circumstances in the *Williams* case, *supra*, are irrelevant, for it is enough that the State has not conformed.

The court below held that the State was concluded by the decree in the former suit because it was privy in title to the Land Company, among other reasons. This view was based upon the fact that the only present interest of the State in the lands is under the mortgage delivered to it by the Land Company. This we submit is a correct view of the situation under the peculiar circumstances of this case. The State when it took the mortgage knew that the Land Company could transfer to it no interest in the land free of the equities established in favor of the United States by the decree in the prior suit. In accepting the mortgage from the Land Company it accepted it subject to all of those equities of which it had notice. It therefore in a sense stood in privity to the Land Company and in equity was bound by the decree. In any event, the protection of a purchase money mortgagee is based only on equit-

able principles, and that protection should not be afforded where the mortgagee is situated as the State is here, since the transaction in which the mortgage was obtained was so obviously designed to circumvent the decree of 1914 and to enable the Land Company to escape the effects of the fraud of which it had been adjudged guilty.

II

THE RIGHT TO MAINTAIN THIS SUIT IS UNAFFECTED BY ANY STATUTE OF LIMITATIONS

It is contended in the briefs of all of the petitioners that this is a suit to cancel the original certification of the lands to the State and that the suit is barred by Section 8 of the Act of March 3, 1891, as amended. Section 8 limits the time within which the United States may bring suit to vacate and annul any patent issued by the United States. It is confined by its terms to patents and does not in terms include certifications. The petitioners contend that for various reasons it should be held to include certifications. This statute as one of limitations against the United States is to be narrowly construed. See *United States* v. *Whited & Wheless,* 246 U. S. 552, 561. We do not believe that the statute should be construed to include certifications, but we contend that this Court has authoritatively determined that this is not a suit to cancel a certification. (*Independent Coal Company* v. *United States, supra,* p. 650.) That is the law of this case and accordingly we deem it unnec-

essary to argue the question whether or not Section 8 limits the time for bringing suits to cancel certifications, for this is not such a suit. The court below also held that this was not a suit to cancel certifications. An examination of the prayer for relief contained in the amended bill of complaint (R. 5–6) shows that the plaintiff does not seek a cancellation of the certification. While the answer of the United States to the State's petition in intervention asks, as alternative relief, the cancellation of the original certification, that is sought only in the event that the primary relief is not granted and the primary relief sought against the State was the same as that sought against the company petitioners in the amended bill.

That this is not a suit to cancel the original certifications seems to be obvious from the fact that the decree of the court below did not direct such cancellation, and, furthermore, there is no need to cancel such certifications for the United States to perfect its title and receive the full relief to which it was entitled under the 1914 decree. By virtue of that decree the United States either possessed equitable title to the land with a right to a transfer of legal title, or became equitably entitled thereto. By the transaction between the State and the Land Company in 1920, legal title to the land was conveyed by the State subject only to its lien under the mortgage executed by the Land Company. Since nothing has happened to divest the United States of its equitable ownership or its

equitable right to ownership, all that is necesary to complete its title is for the two companies to convey the legal title vested in them and for the mortgage held by the State to be cancelled. The decree of 1914 established the right of the United States to a conveyance by the two companies, if thereafter they should ever acquire legal title. The execution of the mortgage was necessarily an empty gesture, since the Land Company had no equitable right in the land which it could convey. The mortgage is a mere cloud on the Government's title without substance or effect, and since the State was a party to this suit that cloud could be removed herein. Neither the requirement that the two companies should convey to the United States nor that the mortgage of the State should be cancelled operated upon the original certifications. This suit was therefore in no sense to cancel those certifications and such cancellation was entirely unnecessary. As the court below said, "It is true that these 5,564.28 acres stand charged to Utah, but the charge is easily removed, and non-mineral lands can be selected in lieu thereof." (R. 622.)

III

FRAUD IN PROCURING THE ISSUANCE OF THE ORIGINAL CERTIFICATION WAS ESTABLISHED IN THIS CASE

Since this is not a suit to cancel certification, and since it is unnecessary to determine whether the State was bound by the 1914 decree, it is perhaps

unnecessary to refer to the finding made by the court below that fraud in the issuance of the original certification was established in this case in which the State was a party. However, as that point is argued, it is perhaps proper to discuss it briefly.

At the trial of this case there was introduced the transcript of the testimony of one Joseph A. Taff, taken in the *Milner* case, and it was stipulated by counsel for the State and the two companies that such testimony might be read in evidence with the same effect as if the witness were personally present, subject to objections as to competency, relevancy and materiality. (R. 103, 106.) The testimony so offered showed that the land was known to be coal land at the time the Government certified it to the State as agricultural and grazing land. Testimony was offered on behalf of the petitioners which was in conflict with this testimony. The court below, however, found that the lands were in fact mineral lands not subject to grant and that the Milners knew the facts when they participated in obtaining the original certifications. (R. 618.) This finding does not depend upon the admissibility against the State of parts of the record in the *Milner* case. Irrespective of the objection made on behalf of the petitioners to the admissibility of parts of the record in the *Milner* case, the stipulation authorizing the use of Taff's testimony in this case, and the testimony so used, sufficiently sustain the finding made. Accordingly, irrespective of

the admissibility of parts of the record in the *Milner* case, there is a finding in this case supported by evidence that the lands were known mineral lands when certified to the State.

In this connection the original rule of the General Land Office requiring exposure of commercially valuable coal before lands could be listed as mineral is irrelevant. It has been conclusively determined that the rule was erroneous. *Diamond Coal and Coke Co.* v. *United States,* 233 U. S. 236.

As against the two companies the 1914 decree establishes fraud in the procurement of the original certifications, and if that decree does not establish such fraud against the State the court below has found upon evidence in this case, to which the State is a party, that at the time of such certifications the lands certified were known to be coal lands.

The Independent Coal & Coke Company refers to circumstances indicating that it has expended sums of money upon the lands held by it, apparently for the purpose of showing that it would be a hardship if it were compelled to convey these lands to the United States. (Br. 54, 55.) At the same time it announces its willingness to pay any amount that shall be required on an accounting. (Br. p. 19.) If there is hardship in complying with the decree of the court below, it is a hardship which the Coal Company risked with full knowledge of the equitable rights of the United States, and it knew

when it purchased a portion of the lands from the Coal Company that its title might be questioned by the United States. The expenditures which have been made, therefore, were made at its peril, and they furnish no reason for denying the equitable relief to which the United States is clearly entitled.

It is also suggested in the brief for the Coal Company (Br. p. 55), that if its contentions are sustained the State of Utah and its institutions will receive a benefit of which they will be deprived if the decree is affirmed. But neither the State nor its institutions had any right to this land, which should have been reconveyed to the United States immediately after the decree in 1914, when the State should have conformed its action to the decision of the courts, as suggested in the *Williams* case, *supra*.

CONCLUSION

The judgment of the court below was correct and should be affirmed.

Respectfully submitted,

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